

4/13/98

Dist. Ct. (Hogan) aff'g FRA

Unpublished

Plaintiff Robins Group obtained a jury verdict against the Defendant in Oregon state court for \$170,000, \$100,000 of which was determined to be allocable to conversion. Soon after the judgment, a co-defendant paid \$60,000 which was applied toward the Defendant's obligation, leaving a judgment of \$110,000 plus interest. Plaintiff filed a motion for summary judgment seeking a determination that the \$100,000 conversion debt is nondischargeable under § 523(a)(6). The court granted the Plaintiff summary judgment on the dischargeability issue, holding that the judgment is nondischargeable to the extent it relates to the conversion element of the state court award.

The Plaintiff submitted a second motion for summary judgment on the question of allocation. It was undisputed by the parties that the Plaintiff had submitted a form of judgment in the state court action which allocated the \$60,000 payment to the non-conversion part of the judgment and that the payor had made no allocation. Submission by the Plaintiff of its proposed form of judgment provided objective proof that an allocation had been made by the Plaintiff in the absence of allocation by the payor or the court. Consequently, the entire amount of the conversion judgment remained unpaid at the petition date and nondischargeable.

Defendant appealed from the final order of judgment on both the dischargeability and the allocation issues. In affirming the bankruptcy court, the District Court held that the bankruptcy court correctly interpreted the law and found no error in its findings.

E98-12(6)

(The bankruptcy court opinions appealed from are found at E97-7(8) and E97-9(7)).

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Reid Bankruptcy Ct. 5/4/98 Re

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:

FELIX R. CAPO,

Debtor.

FELIX R. CAPO,

Defendant-Appellant,

v.

ROBINS GROUP LLC,

Plaintiff-Appellee.

Civil No. 98-6034-HO
Bankruptcy Court Case
No. 696-65489-FRA7

ORDER

BACKGROUND

Plaintiff Robins Group LLC (Robins) brought an action in the Circuit Court of Oregon for Multnomah County against defendant Felix Capo (Capo) and one other person for conversion and money-had-and-received. In May, 1996, the case was tried to a jury. With respect to conversion, the trial court instructed the jury as follows: "To prevail

its claim for conversion, Robins Group must prove by a preponderance of the evidence that defendants Capo or Kay intentionally exercised control over Robins Group's property which seriously interfered with Robins Group's rights in the property." After a jury verdict, the court entered a judgment against Capo on this claim in the amount of \$100,000. Appellant's Appendix (App.), Ex. F, pp. 44-53. The court subsequently entered a judgment in the amount of \$170,000 against Capo and his co-defendant on the equitable claim of money-had-and-received. App., Ex. R, p. 188.

On or about May 31, 1996, Robins entered into a confidential settlement agreement with ProWest, Inc. (ProWest), a third party defendant in the state action. App., Ex. F, pp. 77-78; Ex. R, pp. 187-88. ProWest did not specify how the payment in partial satisfaction of the judgment was to be allocated. App., Ex. Q, p. 181.

Capo filed for Chapter 7 Bankruptcy on October 31, 1996, and listed Robins among his unsecured creditors. Robins thereafter instituted an adversary proceeding before the bankruptcy court seeking an order determining Capo's conversion judgment debt to be non-dischargeable. In granting Robin's motion for partial summary judgment, the bankruptcy court concluded the state court conversion judgment against Capo was non-dischargeable. App., Ex. N, pp. 165-72.

Capo then argued the confidential settlement between Robins and ProWest should be allocated to offset Capo's conversion judgment. App., Ex. N, p. 165-72. In granting Robins' second motion for summary judgment, the bankruptcy court found Robins had allocated the ProWest payment solely to the money-had-and-received judgment, rather than the conversion judgment. App., Ex. Y, pp. 238-44.

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. In re DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995). Questions of statutory construction are conclusions of law subject to de novo review. In re MacIntyre, 74 F.3d 186, 187 (9th Cir. 1996).

DISCUSSION

1. Discharge of Conversion Judgment:

Title 11 U.S.C. section 523 states, in relevant part:

(a) A discharge under section 727, 1141 or 1328(b) of this title does not discharge an individual debt . . .
(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

Both parties cite In re Cecchini, 780 F.2d 1440 (9th Cir. 1986). In Cecchini, the court reversed the Bankruptcy Appellate Panel's decision that a stipulated judgment for conversion was dischargeable under 11 U.S.C. § 523(a)(6). In rejecting a requirement that specific intent to injure be

demonstrated under Section 523(a)(6), the Ninth Circuit set forth the following uncomplicated holding: "When a wrongful act such as conversion, done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of a specific intent to injure." Id. at 1443.

Capo argues the authority relied on by the Cecchini court only suggests that a conversion judgment may result in non-dischargeability under 11 U.S.C. § 523(a)(6). This argument is inconsistent with the unambiguous holding of the Cecchini court quoted above. The conversion instruction given to the jury in the state court action, which was proper under Oregon law, fits squarely within the holding in Cecchini. Mustola v. Toddy, 253 Or. 658, 663, 456 F.2d 1004, 1007 (1969). The jury found for Robins and against Capo with respect to the conversion claim and the state court appropriately entered judgment.

The bankruptcy court did not err in concluding the prior state court judgment against Capo for conversion was not dischargeable in bankruptcy.

2. Issue Preclusion:

Issue preclusion bars the relitigation of issues actually adjudicated in previous litigation. Steen v. John Hancock Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997).

In Oregon, a party is barred from relitigating the same

issue in another proceeding if: 1) the issue in the two proceedings is identical; 2) the issue was actually litigated and was essential to a final determination on the merits in the prior proceeding; 3) the party to be precluded has had a full and fair opportunity to be heard on that issue; 4) the party to be precluded was a party or was in privity with a party in the prior proceeding; and 5) the prior proceeding was the type of proceeding to which this court will give preclusive effect. Nelson v. Emerald Peoples Utility District, 318 Or. 99, 104 (1993) (citations omitted).

Capo argues the parties did not litigate the willfulness or the maliciousness of his acts in state court. Rather, Capo contends, the state court found only that Capo's acts constituted intentional interference with Robins' property. Capo does not dispute that the state court jury found in Robins' favor on the conversion claim and the court issued a final judgment on the merits.

Imparting to that judgment the interpretation required by the Ninth Circuit, the judgment debt is non-dischargeable in bankruptcy due to its inherently willful and malicious nature. Cecchini, 780 F.2d at 1443. Capo has pointed to nothing in the record that convinces the court he was deprived of a full and fair opportunity to be heard on the conversion issue.

The bankruptcy court correctly applied the doctrine of issue preclusion to bar Capo from disputing the state court conversion judgment and properly concluded the facts found by the state court support the finding of non-dischargeability.

3. Allocation:

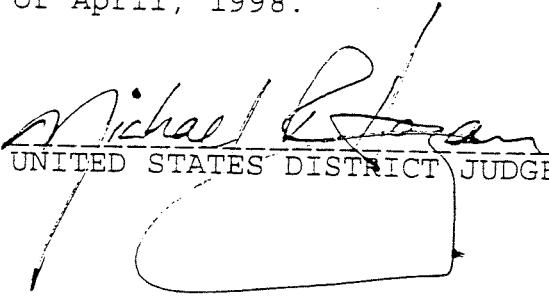
Finally, Capo objects to Robins' failure to allocate the proceeds of its confidential settlement agreement with ProWest to offset Capo's conversion judgment. Under Oregon law, unless a payment by a debtor specifies how it is to be credited, a creditor is free to elect how to credit the payment. Kincaid v. Fitzwater, 257 Or. 170, 173, 474 P.2d 742 (1970).

The record before the court indicates ProWest did not direct how the partial satisfaction of judgment would be allocated. App., Ex. Y, p. 239. Robins decided against allocating the settlement amount to offset Capo's conversion judgment. Under Oregon law, Robins was free to do so.

CONCLUSION

Based on the foregoing, the decision of the bankruptcy court is hereby affirmed.

DATED this 13th day of April, 1998.


UNITED STATES DISTRICT JUDGE

Entered

SEAL 15 APR 1998

[Signature]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBINS GROUP LLC

Plaintiff/Appellee,

v.

FELIX R. CAPO

Civil No. 98-6034-HO
USBC 696-65489-FRA7

Defendant/Appellant.

JUDGMENT

The decision of the bankruptcy court is affirmed.

Dated: April 15, 1998.

Donald M. Cinnamond, Clerk

by *[Signature]*

Lea Force, Deputy

JUDGMENT

DOCUMENT NO: _____

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